

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

77-1160

In The
United States Court of Appeals
For The Second Circuit

B
P/S

UNITED STATES OF AMERICA,

Appellee,

-against-

WILLIAM M. RUFFIN,

Defendant-Appellant.

*On Appeal from a Judgment of Conviction of the United States
District Court for the Southern District of New York.*

BRIEF FOR DEFENDANT-APPELLANT

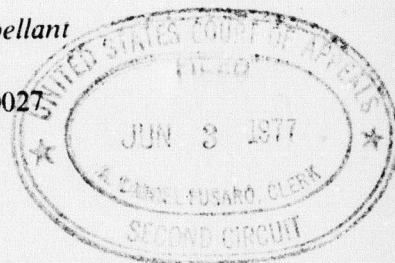
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Docket No. 77-1160

-against-

WILLIAM M. RUFFIN,

Defendant-Appellant.

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BRIEF FOR DEFENDANT APPELLANT

Preliminary Statement

This is an appeal by Defendant-Appellant from his convictions under Counts IV, VII and VIII of the Indictment handed down by a Special Grand Jury in the Eastern District of New York on June 30, 1976. (7a; 10a; 11a)*

The Defendant moved for an order of suppression, based upon the Government's notice as to its evidence in chief. A hearing was held, however that application was denied.

The Defendant was then tried by Jury December 13th through 17th, 1976 before District Judge George C. Pratt. He was convicted for violations of Section 7201, Internal Revenue Code; 26 U.S.C., 7201. Count IV was for Defendant's 1972 individual income tax for failure to report and pay tax on a consturctive dividend. Convictions under Counts VII

*All references to Appendix pages "a", "aa", "b"
All references to Exhibit Volume pages "E"

and VII were for Defendant's acts as President and sole stockholder of Rugore Associates, Inc., for wilfully and knowingly with specific intent to attempt to evade a known tax by the false filing of 1970 and 1971 corporate tax returns in November 1972. The Jury found that the Defendant was not guilty as to Counts II and III.

ISSUES ON THIS APPEAL

1. Was the evidence sufficient at the suppression hearing, to support granting the motion, in that the United States Attorney failed to inform Defendant as a Special Grand Jury witness, on March 7 and 14, 1975, that he was a prosecutorial target witness?

2. Was there sufficient independent evidence, to find Defendant guilty of a wilful and knowing attempt to evade and defeat payment of large portions of Rugore's corporate income taxes, known to be due and owing, when he filed its 1970 and 1971 corporate returns in November 1972?

3. Was the Court's refusal to Charge as to careless disregard for the law was not enough to constitute wilfulness reversible error?

4. Did the Trial Court commit reversible error in excluding, as an issue of fact, Defendant's evidence

on 5 year depreciation and useful life of building?

5. Did the Trial Court commit reversible error in admitting, as an issue of fact on wilfulness, the testimony of witness Hamill, which was expert testimony on the legal meaning of 18 pages of legal documents: (1) though he was not an attorney; (2) was hearsay as to what documents not before the Court said; (3) though it was not proper rebuttal?

6. Did the Trial Court commit reversible error in admitting into evidence Internal Revenue computer print-outs, without factual evidence as to creation procedure, or the method of establishing trustworthiness, without identity of entrant, statement attributed to the Defendant on the fact issue of wilfulness?

7. Was the Court's Charge, that Defendant's signature alone, was basis for an inference of knowledge of content of corporate tax returns, in determining wilfulness, reversible error?

There are many other issues which could validly be raised on this appeal, i.e. the Court's Charge of Defendant's right to subpoena and to call witnesses to prove his innocence of the charges against him. However, we have stated those issues we believe are central to the disposition of this appeal.

STATEMENT OF THE FACTS OF THE CASE

This is not the usual tax evasion case, which emanated from the Internal Revenue Service Administrative ranks. It had its genesis from the Defendant appearing before a Special Grand Jury investigating the Bedford-Stuyvesant Youth In Action Antipoverty Program. (27a; 31a; 32a; 33a 140a)

Defendant as agent for Rugore Associates leased a building at 1402 Bedford Avenue, from 1969 through 1974 to the Community Sponsors, a delegate agency of the Bedford-Stuyvesant Youth In Action Program. (138a; 139a; Exhibit 2; 3; 5; E26; E31; E45) He was not advised that he was a potential Defendant and target of the investigation. (27a)

However, Defendant's March 7, 1975 response to the United States Attorney interrogations lead to his indictment for individual and corporate tax reporting for five years. Defendant was not advised that he was being investigated or to produce his income tax returns when he appeared on March 7, 1975. He was not cautioned not to proceed further in that area of interrogation, when the Assistant United States Attorney well-knew, saw and understood the legal

ramifications of Defendant's statements. (26a; 27a; 28a; Exhibit 11A: 11B: 11C: E160; E194; E215)

Immediately thereafter, the United States Attorney turned over the documents that the Defendant had produced to the Internal Revenue Service. In addition, he directed the Defendant to return on March 14, 1975 for further interrogations, and additionally to produce the corporate returns upon which he was convicted.

The Defendant's Grand Jury testimony upon being transcribed was sent or picked-up by Internal Revenue Service. Moreover, during the interim the United States Attorney was communicating with Special Agent Siegel, almost on a daily basis in regard to the Defendant. (31a; 32a; 33a; 34a; Exhibit A E468)

The Defendant's Grand Jury testimony, and the documents he produced were the "fruits of the poisoned tree". These documents were used to prosecute the Defendant at the trial. (Exhibit 1; 1-D; 2; 2-I; 3; 3-K; 5; 7; 8; 10; 21, E1; E12; E17; E26; E31; E41; E45; E55; E143; E158; E266)

The Defendant fully cooperated with Internal Revenue. (92a-96a; 133a-134a) He appeared at the conference without counsel, answered all questions asked of him, and signed an extension of the time as to his

civil tax liability. Defendant wrote Internal Revenue that he would continue to cooperate and was most anxious to clear-up the whole matter. (136a-137a; Exhibit 16; P, E239; E605)

At the United States Attorney's request, the Defendant appeared without counsel on November 11, 1975. For the first time, Defendant was told that he was a potential Defendant, but was asked further questions seeking information to bolster their floundering investigation. (30a; 31a)

The United States Attorney knew that the Defendant had not concealed funds, misappropriated them for his personal use, or failed to record expenditures, or destroyed records. The unreported funds had been found in bank account records in his name, in the account used for corporate income and expenses. Nevertheless, the improperly obtained evidence was used to indict and convict the Defendant.

The Government's proof at the trial showed the Defendant had maintained books and records that truthfully recorded his income and expenses. The Government arrived at the alleged net taxable income deficiency through disallowance of obvious substantial business deductions, which are allowable under the law.

Following the completion of the Government's case, the Trial Court disrupted Defendant's orderly defense and held a suppression hearing at the Government's instance. The Court held that evidence of the useful life of the building, based upon known facts, of a 5 year depreciation would not be permitted to go before the Jury as evidence as an issue of fact. The facts as to the obsolescence of the building were in existence in November 1972. (80a; 81a; 83a; 84a)

The Trial Court received multiple hearsay evidence alleged to be contained in computer print-outs, Exhibits 18A and 18B, without any factual evidence of the methods of creation, or facts to test the trustworthiness and accuracy of the reported data, or requiring the production of the underlying document for use on cross-examination. The Defendant requested the document during pre-trial discovery and at trial. However, the Trial Court refused to compel its production. (46a; 47a; 59a-61a)

Over Defendant's objection, the Trial Court admitted witness Hamill's testimony, which was expert testimony as to interpretation of 18 pages of legal documents. This evidence was as to what the witness said he saw on microfilm of the documents not before

the Court. The witness was not an attorney, and it was improper evidence of Government's proof of wilfulness and intent on rebuttal. (155a-161a; 162a-163a; 164a-165a)

The Jury was allowed to consider this evidence in arriving at its wilfulness determination as to the Defendant knowingly and deliberately attempting to evade payment of known corporate income taxes for the years 1970 and 1971, and Defendant's 1972 personal income taxes.

Defendant's eight (8) character witnesses testified as to his impeccable record as a trustworthy, honest, law-abiding citizen, who has given many years of service to his country in the United States Army, and as an active Army Reserve Officer; as well as dedicated service to his community. (97a-116a; 141a-154a)

ARGUMENT

POINT I

THE EVIDENCE AT THE SUPPRESSION HEARING
SUPPORTED THE GRANTING OF DEFENDANT'S
APPLICATION TO SUPPRESS

The United States Attorney did not inform the Defendant that he was the target of its investigation, when he appeared before the Special Grand Jury on March 7 and 14 1975. The Defendant's privilege against self-incrimination was infringed upon. The United States Attorney failed to follow the standard practice of disclosure to Defendant, that he was a target of the investigation. His Grand Jury testimony, along with its fruits should have been suppressed.

Immediately following Defendant's March 7, 1975 Grand Jury appearance the United States Attorney, forwarded the documents obtained from Defendant to the Internal Revenue Service. These documents were used to convict the Defendant at trial.

The American Bar Association Project on Minimum Standards for Criminal Justice, Relating to the Prosecution Functions (Approved Draft 1971) in Section 3.6(d) p. 88 provides:

"If the prosecutor believes that a witness is a potential defendant he should not seek to compel his testimony before the grand jury without informing him that he may be charged and that he should seek independent legal advice concerning his rights."

The United States Attorney well-knew the Defendant's lack of awareness of the criminal implications with respect to Defendant's testimony as an undisclosed target of the investigation. Nevertheless, he pursued his improper prosecutorial deprivation of the Defendant's rights of due process.

This Court in its opinion on the remand from the Supreme Court in United States v. Jacobs, No. 75-1319 (2d Cir. Dec. 30, (1976), extensively reviewed the thrust of the case law where a Defendant has not been warned that he was a target of an investigation.

The Court below found after a hearing, held December 9, 1976, that at least one prosecutor, and apparently both had in mind that the Ruffin was a potential Defendant. (42a; 44a) Nevertheless, the Court stated that it did not believe the Defendant, when he testified at the hearing he had no idea that he was the subject of a possible criminal investigation until November 11, 1975. The Court concluded that the United States Attorney under those circumstances

was not bound to follow the standard procedure. Therefore, the Defendant should have alerted him to the possibility of criminal liability arising out of the questions being asked. (42a, 43a; 44a; 45a)

However, that is not the law of this Circuit.

As restated in United States v. Jacobs, supra at page 1189:

"In this Circuit that thrust of the case law, from a constitutional point of view has been more akin to the Supreme Court's subsequent decision in Mandujano than the decision of the Fifth Circuit. E.g. United States v. Del Toro, 513 F. 2d 656, 664 (2d Cir.), Cert. denied, 423 U.S. 825 (1975). In Jacobs, we noted however, that in Del Toro and in a series of similar cases, the defendant had, in practice, always been warned that he was a target of the investigation. That this has been the uniform practice of prosecutors in our Circuit, for much longer than twenty years, was preceptively observed by Judge Medina in United States v. Scully 225 F. 2d 113, 116 (2d. Cir., 1955)." [Emphasis Added]

The Government argued in the Court below that United States v. Mandujano, 96 S. Ct. 1768 (1976), 19 Cr. L. 3087, (May 19, 1976), which reversed a perjury issue case was dispositive of the suppression issue in this case. This Court had not rendered its opinion on the remand of the United States v. Jacobs, supra, at that point. However, Mandujano, supra, did not hold that there are no Fifth Amendment rights of a prosecutorial witness before the Grand Jury. It did not overrule its ruling as to privilege against self-incrimination by

prosecutorial witnesses. In the dissenting opinion of Mr. Justices Brennan and Marshall 19 Cr. L. at p. 3095 it is stated:

"This Court has consistently emphasized and, more importantly, has stood fast to ensure the essential premise underlying our entire system of criminal justice: 'that ours is an accusatorial and not an inquisitional system--a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. Rodgers v. Richmond 365 U.S. 534, 541 (1961) Numerous opinions express the Court's determination to enforce the guarantee of an adversary system embodied in our Bill of Rights in the face of attempts in the name of expediency and in ignorance of the lessons of history, to utilize inquisitional procedures."

The Supreme Court with respect to this issue in the Mandujano, supra, in the various dissenting opinions made clear that such was not the case. At Cr. L. page 3094 in footnote 3 Mr. Justice Brennan stated:

"...Furthermore, 'the Court has evaluated the knowing and intelligent nature of the waiver [under the 'intentional relinquishment or abandonment of a known right or privilege standard of Johnson v. Zerbst, 304 U.S. 458, 464 (1938)]. . . of the privilege against compulsory self-incrimination before an administrative hearing or a congressional committee.' Schneckloth v. Bustamonte, 412 U.S. 218 238 (1973)

Therefore, it is obvious that the Supreme Court thoroughly took into consideration the intent to have the law on this point remain in status quo.

The Supreme Court in Johnson v. Zerbst, 304 U.S. 458, 464 (1938) stated:

"A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding the case, including the backgrounds, experience, and conduct of the accused."

It was later held by the Supreme court in Schneckloth v. Bustamonte, 412 U.S. 218, in reversing the conviction based upon an alleged voluntary waiver of constitutional rights, that waiver of constitutional rights required to justify a demonstration that the consent was in fact voluntary. Voluntariness is to be determined from the totality of the surrounding circumstances.

Unlike Jacobs, supra and Mandujano, supra the Defendant does not assert a constitutional right as a defense against a perjury charge. Moreover, the indictment herein resulted because the Defendant told the truth and produced documents totally unaware that he was in fact a target before the Grand Jury.

The Government contends that the Defendant was not the target of the investigation. (26a) However, its offered evidence belies that. In that the release of

the information obtained from the Defendant to Internal Revenue was under color of right of an ex parte order obtained January 10, 1975. (35a) The Defendant was served with a subpoena on March 5, 1975 to produce the documents and material which were used at the trial herein. (33a - 34a)

Wong Sun v. United States, 371 U.S. 471, 485

(1962) states:

"The exclusionary rule has traditionally barred from trial physical, tangible material obtained either during or as a direct result of an unlawful invasion. It follows from our holding in Silverman v. United States, 365 U.S. 505, that the Fourth Amendment may protect against overhearing of verbal statements as well as against the more traditional seizure of papers and effects'."

In Brown v. Illinois, 422 U.S. 590, (1975), the Supreme Court held that the burden is on the prosecution to show that the evidence is not tainted.

In Katz v. United States, 389 U.S. 347 (1967), the Supreme Court reversed a conviction obtained where illegally obtained evidence was used. In that case the evidence was by a wiretap placed on the outside of a telephone booth. However, the Court held that the constitution protects people not places.

In Fahy v. Connecticut, 375 U.S. 85, (1963), the Supreme Court ruled on the prejudicial effect of illegally obtained evidence. The State argued that it had other evidence than that illegally secured upon which its conviction was based. At page 86 it stated:

"We find that the erroneous admission of this unconstitutionally obtained evidence at this petitioner's trial was prejudicial; therefore, the error was not harmless, and the conviction must be reversed."

It went on to state; at p 86-7:

"We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."

The Supreme Court in Jackson v. Denno, 378 U.S. 368, 376 (1963):

"It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession."

The Defendant herein was unduly prejudiced by the prosecutorial denial of due process. The holding of the

Court below that Defendant should have suspected that something criminal was involved does not cure this constitutional defect.

There was absolutely no showing that the Defendant had voluntarily in effect "confessed" to a serious crime. The Government failed to offer any proof, that he even understood the elements of the crime with which he is charged. In Henderson v. Morgan, _____ U.S. _____, 49 L. Ed. 2d 108, 96 S. Ct. [No. 74-1529], (1976), the Supreme Court held that a defendant's "confession" may be involuntary either because he does not understand the nature of the constitutional protection that he is waiving, or because he has such an incomplete understanding of the charge.

Therefore, for the Court below to equate the Defendant's statements at the suppression hearing as proof of a voluntary waiver of a known constitutional right is untenable. Such is not the law. Looking at the totality of the circumstances involved in this case, the United States Attorney knew the law, but the Defendant did not.

The Supreme Court in Henderson, supra, at 49 L. Ed. 2d 108, 114 stated:

" Nevertheless, such a plea cannot support a judgment of guilt unless it was voluntary in a constitutional sense. And clearly the plea

could not be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the defendant received 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.' Smith v. O'Grady, 312 U.S. 329, 223, 85 L. Ed. 859, 61 S.Ct. 572."

In no instance did the United States Attorney even argue that the Defendant understood the significance of, or the elements of the crime at the time he testified. Therefore, the totality of the circumstances under which the evidence was obtained from the Defendant warrants its suppression.

It is also noted that after the Defendant testified regarding the rental income not being reported, the United States Attorney testified that his posture became somewhat different than any other witness. (27a) However, he failed to advise the Defendant of that changed position, or advise him to seek independent counsel. (28a; 29a) In addition thereto, he directed the Defendant to re-appear on March 14, 1975 and to produce more documents. All of these documents were used to prosecute the Defendant.

It was in those circumstance that the Defendant was later interrogated by Internal Revenue Service. Defendant did not refuse to answer any of the questions asked of him and answered truthfully. He admitted that he

did not understand the corporate tax forms, and that he had sought accountant's services to straighten the matter out. As to information as bribes and kickbacks inquired of by Internal Revenue, significantly related to the United States Attorney's investigation. (40a; 41a; Exhibit 16, E239)

The Government conceded that Internal Revenue Service Special Agent Siegal had read Defendant's Grand Jury testimony and had possession of the checks he produced prior to Defendant's November 4, 1975 interview. (36a; 37a) Consequently, Defendant's Grand Jury appearance was the predicate for the indictment.

The evidence is clear that the Defendant was a target at the time of his appearances before the Grand Jury. The Grand Jury minutes were either delivered or picked-up by Special Agent Siegel prior to his communication with the Defendant. He admitted that he did not communicate with the civil division of Internal Revenue Service after obtaining the Grand Jury minutes. Moreover, he did not inform the Defendant that he had read his Grand Jury statements. (38a; 39a; 40a; Exhibit 16, E239)

The most glaring aspect of this case is the United States Attorney's failure to follow the established uniform practice of prosecutors in the Second Circuit.

It was that conduct that produced the indictment of the Defendant.

This Court in United States v. Estepa, 471 F.2d 1132 (2d Cir., 1974), reversed a narcotics conviction and dismissed the indictment after a trial establishing guilt, not because of any constitutional mandate. . . , but in the exercise of its supervisory power. There Judge Friendly (then Chief Judge) at page 1137 stated:

" . . . a reversal with instructions to dismiss the indictment may help to translate the assurances of the United States Attorneys into consistent performances by their assistants."

The conviction of the Defendant herein should be reversed and the indictment dismissed for the lack of a predicate without the Defendant's Grand Jury appearance. It was the failure of the United States Attorney to adhere to this binding rule to warn a witness that he was a potential target of the grand jury investigation that was tantamount to the Defendant's conviction herein.

It was well stated in a most recent New York Times article by Tom Goldstein entitled "Inside The Grand Jury Room", April 16, 1977, at p. 26:

"With the power of the prosecutor against him 'no matter how sophisticated, the witness is at a disadvantage in the grand jury room.' Gary P. Naftalis, a New York City lawyer, and Federal Judge Marvin E. Frankel wrote in a forthcoming book on the grand jury."

The abuse of the witness who appears without counsel, without benefit of immunity, as the Defendant herein is indeed at the mercy of the prosecutor. It is for that reason the supervisory powers of this Court in our criminal justice system is so important. In the instant case it is evident that the Defendant was victimized. This Court under its supervisory powers, should follow its holding in the United States v. Estepa, supra, and reverse the convictions and dismiss the indictment.

POINT II

THERE WAS NOT SUFFICIENT EVIDENCE, TO FIND
DEFENDANT GUILTY OF WILFULLY AND KNOWINGLY
ATTEMPTING TO EVADE AND DEFEAT THE PAYMENT
OF A LARGE PART OF RUGORE'S CORPORATE TAXES
WHEN HE FILED THE 1970 AND 1971 CORPORATE
RETURNS IN NOVEMBER 1972, AND HIS INDIVIDUAL
1972 RETURN

There is no evidence in this record that the Defendant has any intent of evasion of payment of income tax on the Rugore rental income. The evidence adduced at trial shows that the Defendant did not know what he was doing with respect to the corporate tax returns. The evidence adduced by the Government at the trial proved that the Defendant in fact did not understand corporate income tax accounting and reporting. The Defendant in fact omitted many legal deductions to which he was entitled. In some years as much as \$10,000.00 was under-utilized. These under deductions included interest, taxes, etc., and the failure to deduct contributions, etc. (71a-72a; Exhibits 23; 2-I; 3-K E462; E26; E41)

The records shows Defendant's identical lack of knowledge and understanding of corporate tax accounting principles on both of the simultaneously filed returns. Even in specific items cases, such as the case at Bar, wilfulness is an essential element of the crime. In United States v. House, 524 F. 2d 1035, (3rd Cir. 1975). At page 1044-5 the Court stated:

"The law is clear that proof that income has been understated is not, without more, sufficient evidence on this element of the offense to sustain a conviction. Holland v. United States, 348 U.S. 121, 139, 75 S. Ct. 127, 99 L. Ed. 150 (1954)"

In United States v. Burrell, 505 F. 2d 904, (5th Cir., 1974) at page 911, the Court Stated:

" The Government clearly must prove that the Defendant acted willfully in attempting to evade the payment of taxes in 1968. Spies v. United States, 317 U.S. 492, 63 S. Ct. 364, 87 L. Ed. 418 (1943); see also, United States v. Bishop, 412 U.S. 346, 93 S. Ct. 2008, 36 L. Ed 2d (1973). It must be shown that the defendant not only understated his income but committed some over act or acts as part of his attempt to evade or defeat the tax. Such affirmative acts of evasion such as concealment of financial transactions and the providing of false or incomplete information in an attempt to hamper the investigation have been held to constitute sufficient evidence to permit the trier of fact to infer the specific intent to evade taxes (cites omitted)".

Such is not the case in the case at Bar. The Defendant did not conceal any of his financial transactions, and nor did he provide false or incomplete information in an attempt to hamper or stall the investigation. Indeed Special Agent Seigel testified that the Defendant cooperated, fully and in no instance refused to answer any questions asked of him. (93a; 95a-96a) See also testimony of Agent Rosenblatt (113a-135a)

The Defendant did not conceal the deposit of the understated income. It was maintained in bank accounts in his name as agent for Rugore, and payments for expenses were not made in cash, but by checks, in which were kept. Indeed he had adequate records of his income and expenses. It can hardly be said that he was attempting to conceal anything.

In United States v. Dowell, 446 F. 2d 145 (10th Cir., 1971), cert. denied, 92 S. Ct. 448, 404 U.S. 984 (1971) "wilfulness" is defined at page 147:

"The attempt to evade or defeat the tax must be a wilful attempt...The Government must prove beyond a reasonable doubt that there was an attempt made voluntarily and intentionally and with the specific intent to keep from the Government a tax imposed by the tax laws."

In United States v. Pohlman, 522 F. 2d 974 (8th Cir. 1975), cert. denied 96 S. Ct. 7766 (1976), the Court held that "wilfulness" denotes an act "deliberate, intentional and without justifiable excuse, or otherwise states, a voluntary, intentional violation of [a] known legal duty."

As stated above there is not such evidence. The record is devoid of any acts from which there can be an implication that this Defendant attempted a voluntary and deliberate violation of a known legal duty.

The testimony of Mr. Stewart was quite the opposite. From his studies of the tax returns filed for Rugore Associates by this Defendant for 1970 and 1971 the Defendant did not know what he was doing.

In fact the Government offered no evidence of wilfulness at the time of trial. They offered no evidence, which is normally found in these types of cases from which the jury could find the Defendant acted wilfully. There was no evidence that the Defendant was keeping a double set of books, making false entries or alterations, made false invoices or documents, destroying books or records, concealing assets or covering up sources of income, requiring income to be paid in cash, or had any conduct that would have the effect to mislead or conceal. Spies v. United States, 317 U.S. 492, 499-500, 63 S. Ct. 364, 87 L. Ed. 418 (1943) and Graves v. United States, 191 F. 2d 579, 582 (10th Cir. 1951).

In United States v. Swallow, 511 F. 2d 514 (10th Cir. 1975) as to wilfulness the Court states at p. 520:

"... an attempt to evade the tax, made voluntarily and intentionally with the specific intent of evasion. (cites omitted) Such intent may [be]

drawn from circumstantial evidence alone if the proof is substantial. "(cited omitted)" [Emphasis added.]

In United States v. Slutsky, 487 F. 2d 832, 844 (2d Cir. 1973) Judge Timbers on the issue of wilfulness stated that evidence independent of unreported income was necessary "...proof of a conscious, deliberate, purposeful act or omission, as opposed to an unconscious, unwilling negligent or mistaken one." If any of the record in this case shows negligence on the part of the Defendant.

The Defendant herein was not given an opportunity to present his evidence of his proper and allowable tax deductions. The Internal Revenue Service, even though it had in its possession, the Defendant's records as to available and allowable deductions due the Defendant, failed to investigate those leads provided by the Defendant.

Consequently, the Defendant, in the case at Bar, was placed in the unjust position of having his accountants, to whom he had fully disclosed testify concerning allowable, but not yet allowed business tax deductions. The Defendant had not been presented or told by the Internal Revenue that it claimed that his deductions were not being allowed. At trial portions of Defendant's proof, as to substantial amounts of business deductions were allowable under the Internal

Revenue Code, but were in dispute during the Government's case.

In addition thereto, the evidence in the record show that the Government had in its possession proof that the substantial allowable business loans to 1410 Bedford Corporation were recorded as such in the 1410 Bedford Corporation's records at the time that the loans were made. The Defendant made a request for the Government to produce those records, that had been in the Government's possession from the first time that the Defendant testified before the Grand Jury on March 7th 1975. [Tr. p. 466-468] It must therefore, be concluded that the records would have in fact truthfully reflected the Defendant's contention as to those substantial business loans having been recorded in the pertinent year 1972. The Defendant contends that this was reversible error.

In the United States v. Venditti, 533 F. 2d 217 (5th Cir 1976) the Court affirmed a conviction because the record showed that for three years 77 checks representing business income were deposited in personal accounts. They totaled \$62,488.66 in unreported income. It also showed that the Defendant was aware that by making these deposits

loans they would not be includable as personal income.

In this case there is only one account. We do not have a situation where the Defendant put corporate money in a personal account. All funds went into the corporate account in the Defendant's name as agent.

The account is definitely a corporate account because no personal rent, grocery, telephone bill, were paid by that account. If there were any personal bills paid they were repaid by the Defendant's personal funds. (117a-129a)

While the law is clear that wilfullness is a jury question, the requirement is that there must be substantial circumstantial evidence to support such a finding. The record in the case at Bar is not sufficient for such a determination. The Defendant's conviction should be reversed and set aside for this reason. The evidence was insufficient at the conclusion of Government's case, and at the conclusion of all the evidence. As a matter of law Defendant was entitled to dismissal at both times.

With respect to the Defendant's personal income tax returns there was no evidence that the Defendant knew and understood the concept of the constructive dividend,

or knew that he was required to report any such income on his personal returns. There was no evidence that he knew the legal duty he was accused of violating.

POINT III

THE COURT'S REFUSAL TO GRANT DEFENDANT'S
REQUESTS TO CHARGE AS TO WILFULNESS AND
CARELESS DISREGARD OF THE LAW WAS PRE-
JUDICIAL AND CONSTITUTES REVERSIBLE ERROR

Defendant submitted its written requests to charge to the Trial Court. Court Exhibit B. At the end of the Court's Charge, Defendant's exceptions to the Charge were duly noted. (244a; 245a; 246a)

It is understood that the law is clear that specific exceptions to the Court's Charge on appellate review are considered in the totality of the circumstances with the inferences being drawn most favorable to the Government.

However, in United States v. Gentile, 530 F.2d 461 (2d Cir., 1976) this Court analogized its review of the Trial Court's jury charge. It is appropriate in the case at Bar. In that case Defendant argued that the jury charge on the issue of "knowledge" was fatally imbalanced. At p. 469 the Court stated:

"Our concern in the cases in which we have discussed the need for a balanced charge has been that the language of the charge, by implying that something less than knowledge will be sufficient to convict, may effectively lower the government's burden of persuasion."

The Defendant urges that the Court's refusals in this instant case did just that. For the Court's failure to specifically charge as requested provided

for improper inferences by the jury.

The requirement of Spies v. United States, 317 U.S. 492, 499, 63 S.Ct. 364, 368, 87 L.Ed. 418 (1943) is that a "'wilful and positive attempt to avoid tax' means more than a [w]ilful but passive neglect of the statutory duty.'"

Moreover, the Court below relies solely on United States v. Pomponio, No. 75-1667, ___ U.S. ___, 97 S.Ct. 22, 48 L.Ed.2d ___ (1976).

However, the Court in refusing to grant the Defendant's request for a charge with respect to reckless disregard of the law alone not being enough to prove criminal liability was clear error.

The Supreme Court in Pomponio, supra, held that the trial judge had adequately instructed the jury on wilfulness. That charge was as follows:

"A wilful act was defined in the instruction as 'voluntarily and intentionally and with the specific intent to do something which the law forbids, that is to say with [the] bad purpose either to disobey or to disregard the law.'"

The Trial Court did not give that instruction. It failed to use "bad faith" or "evil motive" as descriptive word in his examples. Nor did he charge the law that careless disregard of the law was not enough. [Tr.p.757]

See United States v Pomponio, supra, at pps. 23-24.

"In Bishop we held . . . that it requires more than a showing of careless disregard"

In no instance did the holding of the Supreme Court in Pomponio, supra, establish the authority that the Defendant was not entitled to this charge. A reading of the charge as a whole supports the Defendant's argument that the charge did not address careless disregard of the law alone being enough to find criminal liability.

The effect of the charge in the instant case was to make careless disregard of the law criminal behavior, which is not the law of this land.

The Government in the case at Bar failed to prove or present sufficient evidence in which it could be inferred beyond a reasonable doubt that the Defendant voluntarily, and intentionally violated a known legal duty from which wilfulness can be inferred.

The Court's charge in the instant case as to wilfulness stated:

"In this connection, you may weigh along with the other evidence in the case whether or not the defendant attempted to conceal his activities, whether he cooperated with the Government to facilitate their ascertaining of the facts and whether the defendant understood the law applicable to his own and Rugore's income tax liability.

"We are involved here with a filing of tax returns which are alleged to be inaccurate. Such filing is unlawful, however, only if it is made wilfully. If made with knowledge of its falseness and with the intent to evade taxes." (226a; 227a)

In United States v. Bengimina, 499 F.2d 117 (8th Cir. 1974) the Circuit Court reversed the judgment of conviction in that case on review of the issue of whether or not the trial court erred when it charged the jury that "[D]efendant's conduct is 'wilful' if he acted through careless or reckless disregard of the law." The Defendant argued in Bengimina that the Trial Court's charge allowed the jury to convict him for careless or reckless conduct as opposed to the intentional or deliberate conduct required under the law. (at p. 1180)

The Court went on to state on pps. 119-120:

"A careless or reckless disregard does not elevate a defendant's conduct to 'wilful' as that term is employed in §7203. Rather 'wilful' requires that the jury determine that the failure to file was deliberate and intentional. Wilful cannot fairly be equated with careless or reckless. The denotation of wilful is deliberate and intentional. Its connotations are many, depending to a considerable extent on the context in which the word is used. Careless and reckless are more accurately equated with a negligent or inadvertent disregard of the proprieties of any given situation. Thus, while 'wilful' is not considered the opposite of 'careless' and 'reckless', the latter do give a contrary connotation to 'wilful' when used in conjunction with negligence, inadvertence or mistake.

These latter terms were used, and properly so, in the Court's charge to distinguish wilful conduct from conduct that is not wilful, in other words, deliberate and intentional.

"It is therefore, error for the Court to charge that a 'careless or reckless disregard' may be considered wilful under §7203. Having thus determined that the inclusion of 'careless and reckless disregard' in the Court's charge was error, we further have determined this error requires reversal due to the prejudicial effect it might have had on the jury."

The Court went on to state that in considering the correctness of the court's instructions, it examined and considered the instructions as a whole. It found that while the remainder of the charge accurately and fairly stated the law, it was convinced that, the possible harm of the incorrect portion was not overcome by the remainder of the instructions.

In United States v. Vitiello, 363 F.2d 240 (3rd Cir. 1966) the Court held that to employ words that characterized careless disregard as wilful as used in the Internal Revenue Code Criminal statute was error. The Court held that wilful meant a bad purpose or without ground for believing that one's act is lawful.

In United States v. Haner, 315 F.2d 792 (5th Cir. 1963) the Circuit Court held that a portion of the Trial Court's charge on wilfulness was plain error requiring reversal because the instruction permitted the

jury to convict the Defendant for carelessness or inadvertence, contrary to the statutory requirements that the failure to file must be wilful.

These three Circuit Court cases are still good law on this point after Pomponio, supra, because they concern the necessity of charging that careless disregard is not enough.

Finally, the Court must be reminded that there was no evidence in this record that the Defendant knew the law applicable to this. No evidence that he knew his legal duty. Quite to the contrary the Rosenblatt and Stewart testimony concerning the Defendant's errors on the deductions evidence that he did not know his legal rights or duties concerning his income taxes.

POINT IV

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN EXCLUDING THE DEFENDANT'S EVIDENCE ON DEPRECIATION AND USEFUL LIFE OF THE BUILDING AS A FACT ISSUE

It must be remembered that the Defendant was not given the opportunity to present proof as to taxable income to Internal Revenue, during the normal procedural means. However, in its defense it sought to offer proof as to the item of a five year useful life depreciation of the building in question. The tax consultant and the accountant at the post-Government case suppression hearing testified as to their basis for the use of that five year depreciation deduction. (80a-81a; 82a; 84aa; 85a-87a; 88a-89a)

At that hearing they each testified that their determination was based upon the existing facts as to the condition of the building as of November 1972. The Government's argument was that the five year depreciation should not be allowed, since it was based upon a change in circumstances. Moreover, Revenue Agent Rosenblatt testified at the hearing that known conditions of change is the useful life of the building could justify an allowable write-off as a tax deduction. (74a; 75a)

However, the Trial Court refused to allow the Defendant to offer any evidence with respect to this

defense, which would have substantially decreased the taxable income at the time that the Defendant prepared and filed the inaccurate corporate tax returns. This is not a situation wherein the taxpayer chose to change the depreciation used after having made a proper and correct selection of the method of computing depreciation.

The Internal Revenue Regulation §1.167(a)-1 states:

"(a) Section 167(a) provides that a reasonable allowance for the exhaustion, wear and tear, obsolescence of property used in trade or business or of property held by the taxpayer for the production of income shall be allowed as a depreciation deduction. The allowance is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan . . . , so that the aggregate of the amounts . . . at the end of estimated useful life of the depreciable property, equal the cost or other basis of the property. . . ."

Section b as to useful life states:

"(b) Useful life, for the purposes of §167 the estimated useful life of an asset is not necessary the useful life inherent in the asset but is the period over which the asset may reasonably be expected to be useful to the taxpayer in his trade or business or in the production of his income. * * * The estimated remaining useful life may be subject to modification by reason of conditions known to exist at the end of the taxable year and shall be redetermined when necessary regardless of the method of computing depreciation."

§1.167(a)-9 Obsolescence states:

" Obsolescence may render an asset economically useless to the taxpayer regardless of its physical condition. * * * In any case in which the taxpayer shows that the estimated useful life previously used should be shortened by reason of obsolescence greater than had been assumed in computing such estimated useful life, a change to a new and shorter estimated useful life computed in accordance with such showing will be permitted."

§1.167 (a)-10(a) states:

" The adequacy of the depreciation allowance of the property in prior years shall be determined on the basis of the allowable method of depreciation used by the taxpayer for such property The preceding sentence shall not be construed as precluding application of any method provided in section 167(b) if taxpayer's failure to claim any allowance for depreciation was due solely to erroneously treating as a deductible expense an item properly chargeable to capital account."

It was the condition of the building that existed at the end of each of the years 1970 and 1971, and known to the Defendant which governed. At the post-Government case suppression hearing, both the accountant and the tax consultant testified with respect to same. (80a-81a; 82a; 84aa; 85-87a; 88a-89a)

It has been held that the determinations of useful life is a question of fact, and therefore, Defendant's counsel requested that it should be received in evidence. That request should have been allowed.

In Casey v. C.I.R., 38 T.C. 357 (1962) at p. 381
the Court stated:

"Inasmuch as the determination of useful life is a question of fact taking into consideration many factors, we must necessarily rely, in addition to any other relevant evidence, upon the estimates testified to by those who are personally familiar with the asset and are qualified to give an expert opinion as to its approximate useful life. Kerr-Cochran, Inc., 30 T.C. 69, 79 (1958); Laura Massaglia, 33 T.C. 379, 388 (1959), aff'd. 28 F.2d 258 (C.A. 10, 1961)."

It has been determined time and again that the determination of useful life is a fact issue to be made by the triers of the facts. (See Dawson-Spatz Packing Co. v. C.I.R., 34 T.C. 507, 512 (1960); Dielectric Materials Co. v. C.I.R., 57 T.C. 587, 592 (1972); Louis Lesser v. C.I.R. 42 T.C. 688, 703-706 (1964) aff'd 352 F.2d 789 (9th Cir., 1965); Estate of Bryan v. C.I.R., 364 F.2d 751, 753, 754, (4th Cir., 1966) aff'd T.C. Memo, 1963-82.

The Trial Court in the instant case in excluding the Defendant's evidence from consideration from the Jury, greatly prejudiced the Defendant, because it effected substantial amounts of allowable deductions. They totalled \$5,000. more a year, or \$1,250. less in tax liability per year.

It was the contention of the Government that based upon out of Court statements in a conversation with the Defendant's accountant, that the evidence as to useful life of the building was hindsight. However, this was not the case as the facts were adduced at the suppression hearing. Therefore, the Trial Court erred in excluding this evidence as a fact issue, that could have been relied upon by the Jury in making its determination as to the conviction of the Defendant.

POINT V

THE TRIAL COURT COMMITTED REVERSIBLE ERROR
IN ADMITTING NON-EXPERT REBUTTAL TESTIMONY
AS TO INTERPRETATION OF "ABOUT" SEVEN LEGAL
DOCUMENTS

Over the objection of the Defendant the Trial Court permitted witness Hamill to testify as to his interpretation of 7 legal documents which he reviewed in the New York City register office. (159a-161a) Witness Hamill was not a lawyer although he graduated from law school about 4 years ago. He testified that he had taken the New York State examination but he failed. He was employed as an intelligence agent by the Internal Revenue. (162a-163a)

He testified that he had been given instructions by the Government during the December 16, 1976 luncheon recess to go to the Register's office and get copies of deeds and mortgage recorded for the years 1968 for premises 1418 Bedford Avenue. He testifies that he was unable to obtain certified copies of those documents because it cost \$36.00 which he did not have and that would have taken five (5) days. (164a-165a)

He testified that he then made notes which were admitted into evidence as Govt. Exhibit U. It is his interpretation from reading the microfilm of maybe five, six or even

seven deeds and mortgages for 1418 Bedford Avenue. He testified that because it would cost \$36.00 at \$2.00 a page it was 16 pages of documents (165a-166a). Defendant argues that this evidence should not have been admitted into evidence and that it was prejudicial and constituted reversible error.(159a-161a)

In Ric Wil Co. v. E. B. Kaiser Co., 95 F. supp. 552 (N.D.Ill., 1948) modified 179 F. 2d 401, (1951) held the one who is not a member of the Bar is not qualified to testify to the legal effects of documents. The Statute of Rules of the Court as to admission to the Bar establish the minimum required qualifications for one who attempts to interpret or apply legal subject matter.

In New York County Lawyers Assn. v. Darcy 28 A.D. 2d 161 (1st Dept. 1967) the Appellate Division, First Department, held on page 993.

"There is no inherent right to practice law and the State has the power to prescribe the qualifications of and to license those who may practice law and prohibit other from doing so (see Mtr. N.Y. County Lawyers Assn. (Roel,) 4 Misc. 2d 728, 731, 156 N.Y.S. 2d 651 affd. 3 A.D. 2d 742, affd. 3 N.Y. 2d 224, 165 N.Y.S. 2d 31.144 N.E.2d 24, appeal dismissed 355 U.S. 604 78S. Ct. 535, 2 L. Ed. 2d 524; . . . ".

Spivak v. Sachs, 263 N.Y.S. 2d 953, 16 N.Y. 2d 163 (1965) was a case in which a California lawyer attempted

to collect for legal services, consultation and advice on New York law. However, the New York Court of Appeals held at page 955:

"It is settled that the practice of law forbidden in this State by Section 270 of the Penal Law to all but duly licensed New York Attorneys includes legal advice and counsel as well as appearing in the courts and holding oneself out as a lawyer (cites omitted). All this Plaintiff concedes but he argues here, . . . , that although not admitted to the New York Bar he must still collect a fee for legal services performed here, since what he did was a 'single, isolated incident' and not the 'practice of law. We think this is a misreading of the statute and a misapplication of the holdings in People v. Alfani (supra) and People v. Goldsmith 249 N.Y. 586, 164 N.E. 593, particularly the latter."

The Government will argue that the legal interpretation of the witness Hamill were a single and isolated incident not involving the practice of law. However, as stated in Spivak, supra, this is not the law. Witness Hamill was not qualified to give legal expert testimony as to the meaning of legal documents he was on microfilm.

To submit this properly received evidence to the Jury, that could have been used to determine whether or not

substantial sums paid by the Defendant for real estate taxes on 1418 Bedford Avenue was improper. It was highly prejudicial to Defendant particularly in view of the facts that it was improperly received as rebuttal testimony at a point when the Defendant was foreclosed from offering further evidence. Under these circumstances it constitutes, reversible error.

In addition, the Government has more than ample time to obtain certified copies of the documents. The Government knew from before December 9, 1976, that the Defendant would argue equity ownership of the building. In addition as far back as March 1975, the Government had the checks which had written on the back thereof that they were purchases of the mortgages at 1418 Bedford Avenue in 1972. The Government knew that the Defendant had paid expenses, i.e. real estate taxes on that property as business expenses at that time. However, the Government failed to act. It furthermore must be noted that the testimony by Hamill was hearsay in that it was offered for the truth of out of court statements. There is no specific rule of the Federal Rules of Evidence which allows such testimony as an exception.

In addition it was unfair to admit such. Because

it was admitted as part of the Government's rebuttal case, the Defendant would not have had the opportunity to offer evidence to the contrary or the opportunity to offer evidence that Mr. Hamill had mis-read, or lied concerning the contents of the legal documents.

Furthermore, this evidence was inadmissible because it was immaterial, and it was rebuttal evidence. I was improper, because it did not rebut any evidence offered by the Defendant as part of its defense.

Among the Government's Exhibit (E266) 21 checks, which they had possession of from Defendant's March 1975 Grand Jury appearance, show that the checks paid for purchase of mortgages which were held on the property. The testimony by Hamill was that the documents demonstrated same. However, to allow him to testify in that manner threw a "red herring" before the Jury as to wilfulness and intent, and had a very prejudicial effect on the Jury on this point.

POINT VI

THE TRIAL COURT COMMITTED REVERSIBLE ERROR
IN ADMITTING INTO EVIDENCE INTERNAL REVENUE
COMPUTER PRINT-OUTS WITHOUT FACTUAL EVIDENCE
AS TO PROCEDURE OF ITS CREATION, FACTUAL
EVIDENCE AS TO IDENTITY OF ENTRANT OF THE
ALLEGED STATEMENT ATTRIBUTED TO THE DEFENDANT

As a part of the Government's case in chief Exhibits 18 A and 18B were received in evidence over the objection of the Defendant. (49aa-49b, 50a; 53a, 54a, 55a-57a) Neither or those documents pursuant to the Defendant's Rule 16 application had been identified or copies provided to the Defendant. The only documents produced pursuant to Defendant's request was Exhibit P, (E605). The government never identified Exhibit 18A and 18B (E252 and E259) at any time prior to the trial as documents it intended to use in its case in chief. Although it allegedly includes a statement of the Defendant.

On December 13, out of the presence of the Jury the Government requested the documents now marked Exhibit 18A and 18B (E252 and E259) to be marked in evidence. When defense inquired as to what the documents were the Government stated that they did not know and had to wait the appearance of the witness from Internal Revenue Service. Defendant objected

to the receipt in evidence of Exhibit 18A and 18B. (46a-48a; E252; E259). However, the Court overruled the objection and the documents were received.

The witness Martin used these documents in the course of his testimony but was unable to provide any information with respect to the creation of the documents 18A and 18B, as to who is alleged to have taken the statement attributed to the Defendant on October 12, 1973, or whether or not it was an oral or written statement. (53a; 55a; 56a; 57a)

The Defendant objected to this evidence which was overruled by the Trial Court. The Defendant then requested the production of the document upon which it is alleged that the unidentified person had taken orally by phone or in writing, which ultimately is alleged to have been coded and programmed into the computer of which Exhibit 18A is a transcript. The Court overruled Defendant's request and therefore Defendant was unable to go behind or inquire into the alleged statement. (59a-60a) The Defendant contends that this is reversible error in that it unduly prejudiced the Defendant. The Defendant contends the testimony of the witness Martin was double hearsay and

did not come within the exception to the hearsay rules under the Federal Rules of Evidence.

Under F.R.E. Rules 803 (6) with respect to business records exception to the hearsay rule, a file copy of letter held inadmissible absent showing that an original letter had been mailed to the Defendant. The mere presence of letter, kept in the regular course of business is not sufficient to raise a presumption of mailing.

Under F.R.E. Rules 803 (6) the lack of proper foundation for admission of such evidence is the failure to show the input procedure used, the tests for accuracy, and reliability. The fact that an established business relies on the computerized records in the ordinary course of carrying on its activities under those circumstances is not enough. The Defendant must be given an opportunity to apply his defense to computerized material used by the Government. United States v. Stifel, 433 F.2d 431 (6th Cir. 1970), cert. denied, 40 U.S. 994, 91 S. Ct. 1232, 28 L. Ed 2d 531 (1971).

However, it was stated in the United States v. Knudsen, 320 F. Supp. 878 (W.D. Wis., 1971), that it requires no citation of authority to conclude that such items are inadmissible as proof of the facts therein alleged. Rule 27 of Federal Rules of Criminal Procedure which makes Rule 44

(c) under the Federal Rules of Civil Procedure applicable to criminal trials does not mean that any item in an official record is admitted automatically for any purpose whatsoever.

The challenged statement, the code 590 statement contained in the computer print-out, may as a public document be admissible, however, that does not mean that the contents thereof are also automatically admissible. Vanadium Corporation v. Fidelity and Deposit Co. 159 F.2d 105 (2d Cir. 1971). Therefore, the contents of the document are only admissible if the author or entrant could testify to same. In the instant case he could not because Internal Revenue does not know his identity or his qualifications to program the information into the computer. The purpose of the rule is to do away with the need of the author or the entrant to testify, but not as is sought in this case, to do away with the author or entrant completely. Olender v. United States, 210 F. 2d 795 (9th Cir. 1954); Yung Jin Teung v. Dulles 229 F.2d 244 (2d Cir. 1956).

In the United States v. Van Hook, 28 F.2d 489 (7th Cir. 1961) A letter was received but the author of the letter was himself a witness to its content.

In the United States v. Grayson, 166 F.2d 863, (2d Cir. 1948) in ruling on a similar multiple hearsay question stated p. 809:

"In cases where an entrant records what he has heard, the document will be evidence of what [others] have told him only in case it appears that it was part of his regular course of business to report to him what the declarants themselves knew, as it was part of his business to record what they said. * * * The 'act, transaction, occurrence or event' which the entrant records must be one of which either he had knowledge, or he learns from a declarant who shall 'in the course of the business transmit the information for inclusion in the memorandum.' 'Multiple hearsay' is no more competent now than hearsay was before."

Thus, when the information come from others to the entrant or maker, the memorandum or record may be inadmissible, because if it was not the duty of the entrant or maker to record such statements. In the instant case there was no testimony on this point.

In Perma Research and Development v. Singer Co., 54 F.2d 111 (2d Cir., 1976) at p. 125 Circuit Judge Van Graafeiland in his dissenting opinion with respect to evidentiary support for computerized assimilations stated;

"Although the computer has tremendous potential for improving our system of justice by generating more meaningful evidence than was previously available, it presents a real danger of being the vehicle of introducing erroneous, misleading, unreliable evidence. The possibility of an undetected error in computer-generated evidence is a function of many factors; the underlying data may be hearsay; errors may be introduced in any one of the several stages of processing; the

computer might be erroneously programmed, programmed to permit an error to go undetected, or programmed to introduce error in to the data, and the computer may inaccurately display the data or display it in a biased manner. Because of the complexitie of examining the creation of computer-generated evidence and the deceptively neat package in which the computer can display its work product, courts and practitioners must exercise more care with computer-generated evidence than with evidence generated by more traditional means."

* * *

"Judicial decisions to date have largely skirted the edge of the problem. because they have been concerned mainly with computerized records made in the regular course of business. See United States v. Russo 480 F.2d 1228 (6th Cir. 1973), cert. denied, 414 U.S. 1157, 94 S. Ct. 915, 39 L. Ed. 2d 109 (1974); United States v. Georgia, 420 F.2d 889 (9th Cir. 1969) Olympic Ins. Co., v. H. D. Harrison, Inc., 418 F.2d 669 (5th Cir. 1969); D & H Auto Parts, Inc. v. Ford Marketing Corp, 57 F. R.D. 548 (E.D.N.Y. 1973), Routinely prepared records, admitted pursuant to business records acts such as 28 U.S.C. § 1732 (a) are well recognized exceptions to the hearsay rule, because their regular use in the business of the company insures a high degree of accuracy. Proof of day-to-day business reliance upon computerized records should therefore make less onerous the burden of laying a proper foundation for their admission. United States v. Russo, supra 480 F.2d 1239-40."

In the case of Bar there is no means of telling whether or not the computer-generated documents Exhibit 18A and 18B (E252; E259) were created specifically for purpose of litigation. As you may recall the Government was unable to advise the Defendant's counsel any information with respect to the computer-generated documents prior to the time witness Martin took the stand. It was on that basis that defense counsel objected to the admission of these documents, was overruled by the Court. The record does not even demonstrate whether or not the document itself was of the type regularly prepared by the agency pursuant to a duty imposed by law.

Following the witness Martin testimony defense counsel objected to this evidence on the further grounds that the underlying documents used in the production of them were not available to defense counsel. Moreover, such availability should have been made known sufficiently advance of trial so that defense counsel would have an opportunity to examine and test the inputs, program and outputs prior to trial. United States v. Russo, supra 480 F.2d 1228 (6th Cir.1973)

In the case of Bar, as was related by Judge Van Graafeiland in his dissenting opinion in his footnote on p. 126, the Defendant in the case of Bar did not have an adequate

basis on which to cross examine the Government's witness Martin. While in the Perma Research case, supra, all of the information concerning the programming upon which the Government's witness relied was kept from the Defendant. "It was impossible for the Defendant to point to the inaccuracies and omissions that might have been uncovered by full disclosure in proper examination."

The evidence which was improperly admitted in this instance goes to the very heart of an essential element of the crime of criminal tax evasion--intent. The evidence should not have been submitted to the triers of fact. The consideration of such computer-generation information, without any evidence upon which to evaluate its trustworthiness was highly prejudicial to Defendant on the vital points of wilfulness and intent to evade.

Under Federal Rules of Evidence § 803 (6) which states:

"The following are not excluded by the hearsay rules even though the declarant is available as a witness: (6) records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, condition, opinions or diagnosis, made at or near time of, or from information transmitted by, a person with knowledge, if kept in the course of

a regular conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, or data the compilation, all as shown by the testimony or the custodian or other qualified witness, unless the source of information or the method of circumstances or preparation indicates lack of trustworthiness."

As the case at Bar there was no foundation laid by the person having knowledge of the preparation of the computer-generated documents. It is true that under the new Federal Rules of Evidence the declarant need not be present. However, that applies only if the knowledge of the custodian of the records demonstrates that the document has been prepared and kept in the course of a regularly conducted business activity.

The witness Martin was not familiar with the procedure in the preparation of the 590 portion of Exhibits 18A and 18B (E252; E259), or the entire document. He lacked the proper foundation information to demonstrate a circumstantial guarantee of the trustworthiness of the evidence that Code 590 was a statement of the Defendant. He did not know whether it was a oral or written statement. (57a-58a)

The Defendant strongly urges that evidence as

to the essential element of conduct which can be the basis for an inference of wilful, deliberate, knowing intent to evade paying income tax must be infinitely more trustworthy. The Defendant must be afforded an opportunity to go behind it.

The alleged statement of Ruffin to the Internal Revenue Service is not admissible, without the testimony, or at least the identity, of the person to whom the alleged statement was made. To hold otherwise is unjust because there is no way for Defendant to go behind the statement on his defense.

POINT VII

THE TRIAL COURT COMMITTED REVERSIBLE ERROR
IN CHARGING THAT DEFENDANT'S SIGNATURE ON
THE TAX RETURNS ALONE WAS SUFFICIENT BASIS
FOR AN INFERENCE OF HIS KNOWLEDGE ON THE
CONTENT OF THE RETURNS

The Court below in the portion of his Charge addressed the law on wilfulness and specific intent. Properly he stated that mere understatement of income was not enough to infer wilfulness and specific intent to evade income tax. The Court went on to state:

"We are involved here with a filing of tax returns which are alleged to be inaccurate. Such filing is unlawful, however, only if it is made wilfully. If made with knowledge of its falseness and with the intent to evade taxes."
(226a-227a)

However, the Court stated on page 789:

"As to whether the defendant was aware of the content of his personal returns and of the tax returns pertaining to income of Rugore Associates, you are instructed that the law is if you are further convinced beyond a reasonable doubt that the defendant, William Ruffin, signed the tax returns in question, then you may draw the inference to find that he had knowledge of the contents of the returns."

In United States v. Tolchow, 532 F.2 857

(2d Cir. 1976) the Second Circuit adopted the position of the First Circuit in United States v. Romanov, 505 F.2d 814 (1st Cir. 1974) holding that proof of Defendant's signature on documents was only prima facie evidence of his knowledge of its content. In Romanov, the Court stated, that it would be improper to charge that proof of Defendant's signature on a tax return is tantamount to Defendant's conclusive knowledge of its content.

In the United States v. Peskin, 527 F2d 71, 85 (7th Cir. 1975) suggests that it would be reversible error to give a charge which compelled the Jury to define knowledge from the signature alone. In the case at Bar the Trial Court gave such a charge (227a). The Defendant's counsel objected to said charge however, the Court ruling remained. (245a)

The charge by Judge Pratt in the instant case implied that the law is that, the fact that the Defendant signed the tax returns in question, was a fact upon which the Jury could infer, that the Defendant had knowledge of the content of the returns inaccuracies, if any. Such is not the law.

The correct legal holding can best be demonstrated by an example. Assume a return is signed, and on the return on

line 20 he put \$200., and on line 33 he put \$40. The Trial Court's Charge implies, if in the hypothetical case line 20 and 33 are false, that by signing the document, the signer knew those lines were false. Again such is not the law.

This implication, contained in the instant Charge, is very prejudicial, because it is improper to make an automatic presumption that the signer knew the documents was false.

CONCLUSION

The Defendant for the foregoing reasons respectfully urges that the judgment of conviction of Counts IV, VII and VIII should be reversed.

Respectfully submitted,

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**COURT OF APPEALS
SECOND CIRCUIT**

**UNITES STATES OF AMERICA,
Appellee,**

- against -

**WILLIAM M. RUFFIN,
Defendant-Appellant.**

**On Appeal from a Judgment of Conviction of the
United States District Court for the Southern Dist. of
New York.**

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

SS.:

I, Reuben A. Shearer, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 211 West 144th Street, New York, New York 10030.

That on the **3rd** day of **June**, 19 **77** at ~~One St. Andrew's Plaza~~
225 Cadman Plaza
BRKLYN N.Y.

deponent served the annexed

Book

David Trager

**U.S. Atty. So. Dist.
Robert Fiske**

upon

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,

Sworn to before me, this **3rd**
day of **June**, 19 **77**

[Signature]

[Signature]

Reuben A. Shearer

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0418950
Qualified in New York County
Commission Expires March 30, 1979